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No. 00-1937

In the Supreme Court of the United States

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CLEVELAND B. WALTON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

Title II and Title XVI of the Social Security Act define "disability" as the inability to "engage in any substantial gainful activity by reason of any * * * impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A); 42 U.S.C. 1382c(a)(3)(A) (1994 & Supp. V 1999). Under Title II, once a claimant is entitled to disability benefits, the claimant may engage in substantial gainful activity during a "trial work period" of up to nine months without that work activity being considered in determining whether his disability has ceased. 42 U.S.C. 422(c). The questions presented are:

1. Whether a claimant is entitled to disability benefits under Titles II or XVI of the Social Security Act if he has a physical or mental impairment that has lasted or can be expected to last for at least 12 months, but his inability to engage in substantial gainful activity by reason of that impairment has not lasted and cannot be expected to last for 12 months.

2. Whether a claimant is entitled to disability insurance benefits and a "trial work period" under Title II even though, at the time his disability benefits claim is adjudicated, the evidence shows that his impairment no longer prevents him from performing substantial gainful activity and that it did not do so for 12 continuous months.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 235 F.3d 184. The opinion and judgment of the district court (Pet. App. 15a-26a, 27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2000. A petition for rehearing was denied on February 27, 2001 (Pet. App. 62a). On May 21, 2001, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 27, 2001. The petition was filed on June 27, 2001, and was granted on September 25, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Social Security Act, 42 U.S.C. 301 *et seq.*, and the relevant regulations, 20 C.F.R. Pts. 404, 416, are set forth in the Appendix to the petition, Pet. App. 63a-104a.

STATEMENT

Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, provides disability insurance benefits to individuals suffering from a long-term disability, and Title XVI of the Act, 42 U.S.C. 1381 *et seq.*, provides for the payment of Supplemental Security Income (SSI) to such individuals if they satisfy financial need requirements. This case concerns whether the Commissioner of Social Security, when determining whether a claimant is entitled to disability benefits, may deny the claim because the claimant was capable of engaging in—and had in fact successfully engaged in—substantial gainful activity within 12 months of when his impairment first prevented him from performing substantial gainful activity.[1]

A. Statutory and Regulatory Framework

1. *Title II Disability Insurance Program.* As enacted in 1935, Title II of the Act provided old-age benefits for covered workers who retired at age 65, but made no provision for "a lower retirement age for those who are demonstrably retired" before age 65 "by reason of a permanent and total disability." H.R. Rep. No. 1189, 84th Cong., 1st Sess. 3 (1955). Because Congress concluded that covered workers "forced into retirement * * * prior to age 65" should also receive benefits, *id.* at 4, Congress amended the Act in 1956 to establish a system of disability benefits. See Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815.[2]

[1] Until 1995, the social security program was administered under the supervision of the Department of Health and Human Services (HHS). In 1994, Congress established the Social Security Administration as an agency independent of HHS and headed by the Commissioner of Social Security. See Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 106(d), 108 Stat. 1476. References in this brief to the Commissioner for periods prior to 1994 are to the Secretary of HHS, or to his predecessor, the Secretary of Health, Education, and Welfare.

[2] The 1956 amendments limited disability benefits to covered employees who were at least 50 years of age. In 1960, Congress eliminated that restriction. Social Security Amendments of 1960, Pub. L. No. 86-778, 74 Stat. 924. Congress concluded that the "need of younger disabled workers * * * for disability protection" may be "greater than that of older workers" because younger workers "are more likely to have families dependent upon them." H.R. Rep. No. 1799, 86th Cong., 2d Sess. 12 (1960).

Under the 1956 amendments, the Act defined "disability" as the inability to engage in "any substantial gainful activity" by reason of an "impairment which can be expected to result in death or to be of long-continued and indefinite duration." 42 U.S.C. 423(c)(2) (1958). In 1965, Congress revised that definition. "[E]xperience under the disability program" had "demonstrated [that] in the great majority of cases in which total disability continues for at least a year the disability is essentially permanent." S. Rep. No. 404, 89th Cong., 1st Sess., Pt. I, at 99 (1965). Accordingly, Congress replaced the "long-continued and indefinite duration" requirement of the original definition of "disability" with a 12-month duration requirement. See Social Security Amendments of 1965, Pub. L. No. 89-97, § 303(a)(1), 79 Stat. 366. Congress concluded that the new duration requirement would (like the old one) prevent the program from paying "disability benefits in cases of short-term, temporary disability." S. Rep. No. 404, *supra*, at 98. As a result of the 1965 amendments, the Act's basic definition now reads as follows:

> The term "disability" means—inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. 423(d)(1)(A).

The Act further provides that an individual "shall be determined to be under a disability *only if* his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any

other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A) (emphasis added). Congress added that provision to the Act in 1967. See Social Security Amendments of 1967, Pub. L. No. 90-248, § 158(b), 81 Stat. 868; *Bowen* v. *Yuckert*, 482 U.S. 137, 147-148 (1987). The addition responded to a Fourth Circuit decision, *Leftwich* v. *Gardner*, 377 F.2d 287 (1967), which had held that a claimant was under a disability even though he was working at a level that, according to the Secretary of Health, Education and Welfare, demonstrated an ability to engage in substantial gainful activity. H.R. Rep. No. 544, 90th Cong., 1st Sess. 29, 31 (1967). The new provision was found necessary "to reaffirm that an individual who does substantial gainful work despite an impairment or impairments that otherwise might be considered disabling is not disabled." S. Rep. No. 744, 90th Cong., 1st Sess. 49 (1967).

Title II also provides a "waiting period" during which a claimant, even if under a disability, is not entitled to disability insurance benefits. The "waiting period" is "the earliest period of five consecutive calendar months * * * throughout which the individual * * * has been under a disability." 42 U.S.C. 423(c)(2)(A). The 1956 amendments had imposed a 6-month waiting period. See 42 U.S.C. 423(c)(3) (1958). Congress reduced the waiting period to 5 months in 1972. See Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329. Reducing the waiting period did not alter the severity or duration requirements for a finding of disability. As before, "[n]o benefit is payable * * * unless the disability is expected to last (or has lasted) at least 12 consecutive months." H.R. Rep. No. 231, 92d Cong., 1st Sess. 56 (1971).

Finally, Title II provides a "trial work period" to encourage individuals receiving disability benefits to return to work when possible. See 42 U.S.C. 422(c), as added by the Social Security Amendments of 1960, Pub. L. No. 86-778, 74 Stat. 924. During the trial work period, a beneficiary may perform substantial gainful activity for up to nine months

(which need not be consecutive) without losing benefits. The "period of trial work" begins "with the month in which [the claimant] becomes entitled to disability insurance benefits." 42 U.S.C. 422(c)(3). The period ends after the beneficiary has performed services for nine months, or in the month in which the disability actually ceases, whichever is earlier. 42 U.S.C. 422(c)(4)(A) and (B). "[A]ny services rendered by an individual during a period of trial work" are "deemed not to have been rendered by such individual in determining whether his disability has ceased in a month during such period." 42 U.S.C. 422(c)(2); see also *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805 (1999).

2. *Title XVI Supplemental Security Income Program.* Congress enacted Title XVI of the Act in 1972 to provide income to financially needy persons who are aged, blind, or disabled. See Social Security Amendments of 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1465, 42 U.S.C. 1381 *et seq.* Unlike Title II, which is an insurance program, the SSI program is a welfare program based on financial need. *Yuckert*, 482 U.S. at 140. The definitions of disability under Title XVI, 42 U.S.C. 1382c(a)(3)(A) (1994 & Supp. V 1999); 42 U.S.C. 1382c(a)(3)(B), are essentially identical to those under the Title II disability program, 42 U.S.C. 423(d)(1)(A) and (2)(A).

The Title XVI SSI program, unlike the Title II disability insurance program, does not have a waiting period. Instead, benefits are paid to qualifying disabled individuals beginning with the first month after the month in which an application is filed. The Title XVI SSI program also does not provide a "trial work period." Rather, it offers a number of "work incentives." See Employment Opportunities for Disabled Americans Act of 1986, Pub. L. No. 99-643, § 4, 100 Stat. 3575 (amending 42 U.S.C. 1382c to eliminate trial work period).

3. *Regulatory Implementation.* The Social Security Act provides that the initial determination of whether a claimant is disabled may be made by a state agency "acting under the authority and supervision of" the Commissioner. *Yuckert*,

482 U.S. at 142; see 42 U.S.C. 421(a), 421(c), 1383b(a).[3] If the state agency determines that the claimant is not disabled, the claimant may obtain a formal hearing before an Administrative Law Judge (ALJ) in the Social Security Administration (SSA), and may obtain review of an adverse decision by SSA's Appeals Council. 42 U.S.C. 405(b); 20 C.F.R. 404.929 (2000); *Sims* v. *Apfel*, 530 U.S. 103, 105 (2000). A state agency's initial determination of disability must be made "in accordance with * * * the standards and criteria contained in regulations or other written guidelines of the Commissioner of Social Security." 42 U.S.C. 421(a)(1) and (2).

a. *Disability.* The Commissioner, by regulation and in instructions issued to state agencies pursuant to 42 U.S.C. 421(a)(1), has for more than four decades interpreted the Act as precluding an award of disability benefits unless both the claimant's impairment and his inability to engage in substantial gainful activity by reason of the impairment have lasted or can be expected to last for at least 12 consecutive months. Thus, it is not enough that an individual's underlying medical *impairment* has lasted or can be expected to last, at some discernible level, for 12 months. Instead, the impairment must last or be expected to last at a sufficient level of *severity* to render the individual disabled—*i.e.*, to render him unable to engage in substantial gainful activity—for at least 12 months. See, *e.g.*, 20 C.F.R. 404.1501(f) (1960) (duration requirement not met if, within the foreseeable future, "the impairment will * * * be so diminished as no longer to prevent substantial gainful activity."); 20 C.F.R. 404.1502(f) (1961) (same); Social Security Ruling (SSR) 73-7c, at 122-123 (Cum. ed. 1971-1975) ("The two components of disability"—the impairment and the inability to engage in substantial

[3] If a State does not assume responsibility for making initial eligibility determinations, the Commissioner must make those determinations. 42 U.S.C. 421(b).

gainful activity by reason of the impairment—"must exist at the same time.").

Following notice-and-comment rulemaking, the Commissioner last year reaffirmed that "longstanding" construction. Determining Disability and Blindness; Substantial Gainful Activity Guides, 65 Fed. Reg. 42,772, 42,774 (2000); see also Notice of Proposed Rulemaking, 60 Fed. Reg. 12,166 (1995). The Commissioner explained that "the duration requirement to establish disability will not be met and a disability claim will be denied" if, "within 12 months after the onset of an impairment which prevented substantial gainful activity and before [the agency] ha[s] issued any notice of determination or decision finding disability, the impairment no longer prevents substantial gainful activity." 65 Fed. Reg. at 42,774. The Commissioner's regulations similarly declare that, when the claimant is "working and the work [he is] doing is substantial gainful activity," the agency "will find that [the claimant is] not disabled regardless of [his] medical condition or [his] age, education, and work experience." 20 C.F.R. 404.1520(b) (2000); see also 20 C.F.R. 404.1520(f), 404.1571.[4]

The determination whether a disability "has lasted or can be expected to last for * * * not less than 12 months" is made in light of the evidence available at the time the state agency, ALJ, or Appeals Council adjudicates the claim. See 65 Fed. Reg. at 42,780. As a result, if the claim is adjudicated more than 12 months after the alleged disability's onset, the evidence may show that the impairment in fact al-

[4] The fact that a claimant is able to engage in substantial gainful activity at the time of the disability determination does not preclude the agency from concluding that the claimant was previously unable to engage in substantial gainful activity for 12 consecutive months, and that the claimant is therefore entitled to benefits. For example, if the claimant was "disabled" for the requisite period of time in the past, but has ceased to be disabled, the agency may award him benefits for what is called a "closed period" of disability. See, *e.g.*, Social Security Program Operations Manual, § 25510.001 (2001); 65 Fed. Reg. at 42,774.

ready has persisted with sufficient severity to prevent the claimant from being able to perform substantial gainful activity for the minimum 12-month period. Conversely, the evidence may prove that the impairment already has *not* persisted (and therefore cannot be "expected" to persist) at a disabling level of severity for 12 months. See *id.* at 42,774, 42,780.

Because the Act permits benefits to be awarded if the claimant is unable to engage in substantial gainful activity by reason of an impairment that "can be *expected* to last" 12 months, 42 U.S.C. 423(d)(1)(A) (emphasis added), disability claims can be—and often are—adjudicated "without having to wait 12 months from onset." 65 Fed. Reg. at 42,774.[5] In that situation, the statute "require[s] * * * a prediction that the worker's disability will continue for a total of at least 12 calendar months after onset of the disability" in order for benefits to be awarded. S. Rep. No. 404, *supra*, at 99. But if the alleged disability *already* "has existed for 12 calendar months or more" at the time the claim is adjudicated, "no [such] prognosis [is] required"; the Commissioner may rely on the claimant's actual experience during the 12-month period. *Ibid.*; see also 65 Fed. Reg. at 42,774.

b. *Trial work.* The Commissioner recently issued regulations addressing the nine-month trial work period under Title II. 20 C.F.R. 404.1592 (as added by 65 Fed. Reg. at 42,787). An individual is not entitled to a trial work period unless he is "entitled to disability insurance benefits." 42 U.S.C. 422(c)(3). Accordingly, the Commissioner has concluded that entitlement to a trial work period—like the entitlement to benefits—is contingent on the claimant's having suffered or being expected to suffer from an impairment of

[5] The average processing time for initial disability determinations by the Commissioner is about three and a half months. See Performance Plan for Fiscal Year 2002, at 77 <*http://www.ssa.gov/performance/2002/2002perfplan.pdf*>.

sufficient severity to prevent the performance of substantial gainful activity for at least 12 months. SSR 82-52, at 328 (Cum. ed. 1981-1985). Consequently, if the Commissioner has not already determined that the claimant is expected to be unable to work for at least 12 months by reason of the impairment, and if the individual in fact successfully returns to work within 12 months of the onset of the alleged disability and before the Commissioner makes such a determination, the claimant is not entitled to disability insurance benefits or, therefore, to a trial work period. See 20 C.F.R. 404.1592(d)(2) (as added by 65 Fed. Reg. at 42,787) ("You are not entitled to a trial work period" if "you perform work demonstrating the ability to engage in substantial gainful activity * * * before the date of any notice of determination or decision finding that you are disabled.").

B. Proceedings in this Case

1. In March 1995, respondent Cleveland Walton applied for disability insurance benefits under Title II and SSI benefits under Title XVI. Respondent had been terminated from his job as an in-school suspension teacher on October 31, 1994, and, following several unsuccessful attempts to return to work, had been diagnosed in March 1995 as having schizophrenia. In May of that year, less than seven months after his work as a teacher had ended and three months after applying for disability insurance benefits, respondent began working part-time as a cashier at a grocery store. His work hours gradually increased, and by October 1995, he earned more than $500 a month. Respondent began to work full time at the grocery store in December 1995, and he worked there successfully for two more years before being suspended for selling alcohol to a minor. Pet. App. 53a-54a; Admin. Rec. 440, 444.

In August 1996, the ALJ determined that respondent was disabled for the period between October 31, 1994, when he was discharged by the school district, and December 1995,

when he began to work full-time at the grocery store. Pet. App. 52a-61a. SSA's Appeals Council remanded the case to the ALJ to determine whether respondent had engaged in substantial gainful activity before December 1995 and within one year of the onset of his alleged disability. Under SSR 82-52, the Appeals Council noted, such activity, if it occurs before the lapse of the 12-month period following onset of the impairment and before the claimant has been found disabled, requires a denial of benefits. *Id.* at 47a-51a.

On remand, the ALJ denied respondent's claim for benefits. Pet. App. 39a-46a. Like the Appeals Council, the ALJ noted that the Commissioner's construction of the Act, set forth in SSR 82-52, provides that a claim must be denied when a claimant successfully returns to work (and thereby demonstrates the ability to perform substantial gainful activity) within 12 months of the alleged disability's onset. See Pet. App. 41a (The "duration requirement provides that [the claimant] must be prevented from performing substantial gainful activity [by reason of the impairment] for a 12-month period even if his impairment lasted or was expected to last for 12 months."). Reviewing the evidence and applying the regulatory criteria for determining whether work constitutes substantial gainful activity, the ALJ concluded that respondent in fact had "returned to substantial gainful activity in October 1995," because his earnings for that month were in excess of $500. *Id.* at 41a-44a.[6] The ALJ therefore

[6] Congress directed the Commissioner to "prescribe" by regulation "the criteria" for determining when "services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity." 42 U.S.C. 423(d)(4)(A) (1994 & Supp. V 1999). An applicant "whose services or earnings meet such criteria, shall * * * be found not to be disabled." *Ibid.* Pursuant to that authority, the Commissioner issued regulations providing that work was rebuttably presumed to be substantial gainful activity if the claimant earned more than $500 in a month. 20 C.F.R. 404.1574(b)(2)(2000). The Commissioner, after this case was decided, increased that amount to $700. 20 C.F.R. 404.1574(b)(2)(2001).

concluded that respondent could "not be found to be under a 'disability'" because his impairment had not "prevented [him] from working for any continuous period of 12 months." *Id.* at 44a.

The ALJ also determined that respondent was not entitled to a trial work period under Title II. Because respondent "is not under a 'disability,'" the ALJ reasoned, "he is not entitled to * * * a trial work period under the Regulations." Pet. App. 44a. The Appeals Council upheld the ALJ's decision. *Id.* at 36a-38a.

2. Respondent sought judicial review in the District Court for the Eastern District of Virginia. The magistrate judge recommended that summary judgment be granted in favor of the Commissioner, Pet. App. 30a-35a, and the district court accepted that recommendation, *id.* at 15a-26a. The magistrate and district court concluded that a claimant's disability—his inability to engage in substantial gainful activity by reason of an impairment—and not just his impairment must last at least 12 months. In this case, they observed, respondent had engaged in substantial gainful activity within 12 months of the date of onset of his impairment. Accordingly, the magistrate and district court held that respondent's claim failed at the first step of the five-step sequential evaluation process used for the adjudication of disability claims, see *Yuckert*, 482 U.S. at 140; 20 C.F.R. 404.1520(b), 416.920(b), because respondent had not been prevented from engaging in substantial gainful activity for the requisite 12-month period. See Pet. App. 23a-24a, 33a-34a.

The magistrate and district court also rejected respondent's request for a trial work period. They concluded that, because respondent was not entitled to disability benefits, he was not entitled to a trial work period either. See Pet. App. 17a-18a n.2.

Finally, the magistrate and district court rejected respondent's claim that "the ALJ erred in not finding him disabled

based on the fact that his impairment was 'expected' to last for a continuous period of not less than 12 months." Pet. App. 34a; see *id.* at 24a. They concluded that the ALJ "did not have to consider prospectively the expectations of the duration of his impairment because the ALJ had the benefit of knowing the actual amounts [respondent] did earn during the period." *Id.* at 34a; see *id.* at 24a. Those earnings "were consistently in excess of $500 per month beginning in October, 1995," and as high as $1,140 in December of that year. *Id.* at 34a; see *id.* at 24a-25a.

3. The court of appeals reversed. Pet. App. 1a-14a. It agreed with the ALJ and the district court that respondent had engaged in substantial work activity in October 1995, less than 12 months after the alleged disability's onset. *Id.* at 2a-3a n.1, 5a. But it rejected the Commissioner's and the district court's conclusion that respondent was ineligible for benefits as a result. *Id.* at 6a.

a. The court of appeals first examined the Commissioner's interpretation of the Act, which requires that the claimant's impairment have lasted, or be expected to last, for at least 12 continuous months at a level of severity sufficient to preclude substantial gainful activity. Applying the two-step test of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court rejected the Commissioner's approach at *Chevron* step one because, in the court's view, it was contrary to the "clear and unambiguous" language of the statute. Pet. App. 6a. The court reasoned that the phrase "which has lasted or can be expected to last for a continuous period of not less than 12 months" in 42 U.S.C. 423(d)(1)(A) modifies "impairment," not "inability to engage in SGA." *Id.* at 7a-8a; see *id.* at 11a. It follows, the court believed, that "a claimant whose impairment was 'expected to result in death,' or which 'lasted' or 'was expected to last' for a continuous period of not less than twelve months may be disabled, even if the inability to engage in substantial gainful activity does not cause death or actually

persist for twelve months." *Id.* at 8a. As the court read the Act, no "duration requirement for the inability to engage in substantial gainful activity * * * exists." *Id.* at 7a.

Based on that construction of the Act, the court of appeals concluded that respondent was entitled to disability insurance benefits because his underlying impairments—his schizophrenia and depression—were expected to last and did last in some discernible form for more than 12 months, even though they did not remain so severe as to prevent him from engaging in substantial gainful activity for 12 months. Pet. App. 9a. The court pointed out that respondent did not engage in a successful work attempt until "May 1995, two months after the five-month waiting period" in 42 U.S.C. 423(a) and (c)(2) had lapsed, and respondent did not engage in substantial gainful activity "until October 1995, well after the five-month waiting period had lapsed." Pet. App. 9a. Under those circumstances, the court concluded, respondent had met the statutory requirements for entitlement to an award of Title II disability insurance benefits. *Ibid.* The court did not separately address respondent's claim for SSI benefits under Title XVI of the Social Security Act, which has no waiting period.

b. The court of appeals next held that respondent was entitled to a trial work period under 42 U.S.C. 422(c). Pet. App. 9a-10a. In the court's view, respondent's entitlement to a trial work period was "conclusively settled" by the court's earlier conclusion that respondent was entitled to disability benefits as of April 1995, when the five-month waiting period under Title II expired. *Id.* at 9a. The court noted that the period of trial work begins once the claimant becomes entitled to disability benefits. *Ibid.* (citing 42 U.S.C. 422(c)(3), which provides that the "period of trial work" begins "with the month in which [the claimant] becomes entitled to disability insurance benefits."). Having found that respondent was entitled to benefits beginning in April 1995, the court found that respondent qualified for a nine-month trial work

period as of that date as well. *Ibid.* Because of that trial work period, the court held that respondent's work in October 1995, which was at a level that constituted substantial gainful activity, could not be used to support a determination that he was not disabled. *Ibid.*

c. Finally, the court rejected the Commissioner's construction of the Act as unreasonable under the second step of *Chevron*. Pet. App. 10a-13a. In so doing, the court for the most part repeated its textual analysis of the Act. *Id.* at 10a-11a. In addition, the court rejected as unreasonable the Commissioner's position that the trial work period cannot begin until after either (a) benefits are granted on the expectation that the individual will not be able to work for 12 months, or (b) the individual in fact was unable to work for 12 consecutive months. The court acknowledged that the Commissioner had interpreted the phrase "can be expected to last" in the definition of disability as intended to enable the Commissioner to "'adjudicate disability claims without having to wait 12 months from the alleged onset of disability, rather than to permit claims to be allowed in the face of evidence that the claimant's impairment did not prevent substantial gainful activity for 12 continuous months.'" *Id.* at 12a (quoting 60 Fed Reg. at 12,168). The court rejected that interpretation because the Act does not explicitly mention adjudication as a prerequisite to a finding of disability; because no other provision of the Act "differentiates between claims adjudicated within twelve months, and claims adjudicated after twelve months"; and because "under the Commissioner's interpretation, a finding of disability, or entitlement to benefits or a trial work period, would be determined, in part, by when the Commissioner adjudicated a claim." *Id.* at 13a.

SUMMARY OF ARGUMENT

I. A. Congress created Title II's disability insurance program in 1956 to fill a perceived gap in the social security

retirement system, which previously limited retirement benefits to workers who retired at age 65 or older. In particular, Congress sought to extend benefits to "workers who are forced into premature retirement" before age 65 by "reason of a permanent and total disability." H.R. Rep. No. 1189, 84th Cong., 1st Sess. 3 (1955). Congress initially ensured that benefits would be limited to such workers by requiring that the impairment that prevents substantial gainful activity be of long-continued and indefinite duration. Although Congress changed the duration requirement to "not less than 12 months" in 1965, it did so because experience had shown that, "in the great majority of cases in which total disability continues for at least a year the disability is essentially permanent." S. Rep. No. 404, 89th Cong., 1st Sess., Pt. I, at 99 (1965). The Act thus defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A); 42 U.S.C. 1382c(a)(3)(A) (1994 & Supp. V 1999). An individual, the Act also declares, "shall be determined to be under a disability *only if* his physical or mental impairment or impairments are of such severity that he" can neither "do his previous work" nor "engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A) (emphasis added); 42 U.S.C. 1382c(a)(3)(B) (emphasis added).

The Commissioner of Social Security has, for the more than four decades of the disability program's existence, consistently interpreted Section 423(d) as requiring *both* that the claimant's physical or mental impairment have lasted or be expected to last at least 12 months, *and* that the impairment have lasted or be expected to last that long at a *level of severity* sufficient to prevent substantial gainful activity. In this case, the court of appeals rejected that construction and

held that no "duration requirement for the inability to engage in substantial gainful activity * * * exists." Pet. App. 7a. The Act's text, the court held, requires only that the *impairment* last 12 months, and therefore precludes any requirement that the *disability* (*i.e.*, the inability to engage in substantial gainful activity on account of that impairment) last that long as well. *Id.* at 8a. The court of appeals' decision rests on faulty logic and a misunderstanding of the judicial role in construing a statute entrusted to an executive agency for administration.

The court of appeals reasoned that, because 42 U.S.C. 423(d)(1)(A) requires the *impairment* to have lasted or be expected to last 12 months, it cannot be construed as requiring the impairment to persist at a *disabling level of severity* during that period. But the court of appeals ignored the fact that Section 423(d)(1)(A) requires not merely an impairment, but also an inability to engage in substantial gainful activity "by reason of" that impairment; the impairment and the resulting inability to work are thus inextricably linked. More fundamentally, the fact that Section 423(d)(1)(A) requires the impairment to last for a particular amount of time simply does not resolve whether the impairment must persist at a specified level of severity during that time. Instead, it shows that Congress has not directly resolved the issue of severity during the 12-month duration through Section 423(d)(1)(A) itself, and instead has left that question for the agency to resolve through the exercise of its expertise. Finally, the court of appeals' analysis ignores the text of 42 U.S.C. 423(d)(2)(A), which requires that the impairment be so severe that it precludes all substantial gainful activity. The court nowhere explained why that severity requirement does not apply to the impairment for the entire 12-month duration requirement. Indeed, the court of appeals' construction is difficult to reconcile with the Act's structure and evident purpose of providing disability benefits to those who cannot work, not impairment compensation to individuals who can work.

B. As Congress has revised the Act over the years, it has repeatedly concurred in the Commissioner's construction. When Congress enacted the program in 1956, the House and Senate Reports explained that the Act provided benefits if the *disability*—statutorily defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment," 42 U.S.C. 423(d)(1)(A)—has lasted or can be expected to last the specified duration. After the Commissioner so construed the statute beginning with the 1957 regulations, Congress repeatedly amended the statute in closely related respects. Each time it not only carefully preserved, but also specifically reaffirmed and ratified, the Commissioner's construction. The Commissioner's construction thus is not merely reasonable or permissible; it is the construction that Congress intended.

C. The court of appeals' decision cannot be reconciled with Congress's deliberate decision not to provide benefits in cases of short-term, temporary disability. Under the court of appeals' construction of the Act, no "duration requirement for the inability to engage in substantial gainful activity * * * exists." Pet. App. 7a. It thus requires the Commissioner to process claims for and award Title II insurance benefits to individuals whose impairments prevent substantial gainful activity for as little as five months, and to process claims for and pay Title XVI SSI disability benefits to claimants who suffer an inability to engage in substantial gainful activity of virtually any duration, however brief. That result is inconsistent with Congress's intent, and its specific decision to reject a reduced disability duration period of six months that, in Congress's view, would have awarded benefits in cases of short-term, temporary disabilities.

II. A. The court of appeals also misconstrued 42 U.S.C. 422(c), which governs trial work periods. Under Section 422,

the trial work period begins with the month in which the claimant "becomes entitled to disability insurance benefits." 42 U.S.C. 422(c)(3). In this case, respondent never became entitled to benefits because, by the time his claim was adjudicated, respondent had returned to substantial gainful activity within 12 months of his disability's onset; in other words, his disability did not last (and therefore could not be expected to last) the required 12-month period. Because respondent never became "entitled" to benefits, the trial work period never began to run.

B. The Commissioner's trial work regulations are, in any event, entirely consistent with and reasonably implement the text of the Social Security Act. They precisely reflect, moreover, how Congress expected disability determinations would be made.

The court of appeals erred in invalidating the Commissioner's trial work regulations based on its concern that entitlement to benefits (and thus to a trial work period) might, under them, occasionally depend on when the claim is adjudicated. Although some claims may be affected by when they are determined, that is a necessary (if regrettable) consequence of permitting the agency "to adjudicate disability claims and award benefits without having to wait 12 months from onset" and the necessity, when so doing, of relying on potentially faulty predictions about the disability's duration. 65 Fed. Reg. at 42,780. Besides, decisions in other legal contexts, particularly ones requiring predictive judgments, are likewise influenced by when the adjudication takes place. Juries, for example, may consider an individual's post-claim, pre-trial behavior—such as successful rehabilitation—when assessing the extent or duration of a claimed injury, even though that evidence might have been unavailable if trial had occurred earlier. Yet no one suggests that courts must fashion an exclusionary rule for such evidence to avoid that result. Similarly, nothing compels the Commissioner to ignore evidence showing the precise duration of a claimant's

disabling impairment simply because it would have been unavailable if the claim had been adjudicated earlier.

ARGUMENT

I. THE SOCIAL SECURITY ACT DOES NOT PROVIDE DISABILITY BENEFITS TO A CLAIMANT WHOSE IMPAIRMENT HAS NOT LASTED AND CANNOT BE EXPECTED TO LAST 12 MONTHS AT A DISABLING LEVEL OF SEVERITY

As enacted in 1935, the Social Security Act provided retirement benefits to covered workers who retired at age 65, but did not provide benefits to workers who were "demonstrably retired" before that age "by reason of a permanent and total disability." See H.R. Rep. No. 1189, 84th Cong., 1st Sess. 3 (1955). To close that "gap" in the Act's coverage, *ibid.*, Congress in 1956 established a program of disability insurance under Title II of the Act. Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815. The Act now defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A). The Act further provides that an individual "shall be determined to be under a disability *only if* his physical or mental impairment or impairments are of such severity" that he can neither "do his previous work" nor "engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A) (emphasis added). Congress used those same definitions in 1972 when it established the Title XVI Supplemental Security Income program, which provides payments to disabled individuals who are financially needy. See 42 U.S.C. 1382c(a)(3)(A) (1994 & Supp. V 1999); 42 U.S.C. 1382c(a)(3)(B).

The Commissioner of Social Security has always interpreted and administered the Act to require both that the claimant's physical or mental impairment have lasted or be expected to last at least 12 months, *and* that the impairment have lasted or be expected to last that long at a *level of severity* sufficient to prevent substantial gainful activity. See pp. 24-27, *infra*. As the Commissioner recently explained following a notice-and-comment rulemaking, the "duration requirement to establish disability will not be met and a disability claim will be denied" if, "within 12 months after the onset of an impairment which prevented substantial gainful activity and before [the agency] ha[s] issued any notice of determination or decision finding disability, the impairment no longer prevents substantial gainful activity." Determining Disability and Blindness; Substantial Gainful Activity Guides, 65 Fed. Reg. 42,772, 42,774 (2000).

In revisiting and revising the disability provisions of the Social Security Act over the years, Congress too has consistently acted on the understanding that the *disability*—the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment," 42 U.S.C. 423(d)(1)(A)—must have lasted or be expected to last at least 12-months. See, *e.g.*, S. Rep. No. 404, 89th Cong., 1st Sess., Pt. I, at 98-99 (1965) (Act "provide[s] for the payment of disability benefits for an insured worker who has been or can be expected to be *totally disabled throughout a continuous period of 12 calendar months*" (emphasis added)); H.R. Rep. No. 231, 92d Cong., 1st Sess. 56 (1971) ("No benefit is payable * * * unless the *disability* is expected to last (or has lasted) at least 12 consecutive months." (emphasis added)). Indeed, when Congress amended the definition of disability in 1965 to replace the "long-continued and indefinite duration" requirement with a 12-month duration requirement, it chose 12 months because, "in the great majority of cases in which *total disability* continues for at least a year the *disability* is essentially permanent." S. Rep. No. 404, *supra*, at 99 (emphasis added). And when Congress amended the definition of disability again in 1967 by adding the limitations in Section 423(d)(2)(A), which expressly condition a finding of disability on the claimant's inability to perform substantial gainful activity, it "reaffirm[ed] that" a claimant "who does substantial gainful work despite an impairment or impairments * * * is not disabled for purposes of establishing a period of disability or for social security benefits based on disability during any period in which such work is performed." S. Rep. No. 744, 90th Cong., 1st Sess. 49 (1967).

The court of appeals in this case nevertheless held that no "duration requirement for the inability to engage in substantial gainful activity * * * exists." Pet. App. 7a. Rejecting repeated expressions of congressional intent and the Commissioner's longstanding construction of the Act, the court of appeals read the text of 42 U.S.C. 423(d)(1)(A) to require only that the claimant's *impairment* last at least 12 months, and, in addition, to preclude the Commissioner from construing the Act to require that the claimant's *disability*—*i.e.*, his "inability to engage in any substantial gainful activity by reason of" that impairment—last at least 12 months as well. *Id.* at 8a. The court of appeals' construction of the statute, however, ignores the express statutory link ("by reason of") between the underlying impairment and the resulting inability to engage in substantial gainful activity. It also rests on faulty logic—that because the Act requires the *impairment* to last 12 months, it cannot also be construed to require the impairment to persist at a *disabling level of severity* for that 12-month period. The court's analysis, moreover, erroneously ignores the additional limitation on the definition of disability in Section 423(d)(2)(A), contravenes Congress's repeatedly expressed intent, and is at war with the Act's purpose of establishing a program for individuals who have *long-term* disabilities. Indeed, Congress has consistently rejected proposals that would extend Titles II

and XVI's coverage from long-term disabilities to short-term disabilities. Yet, the court of appeals' construction effects precisely such an extension, requiring the award of SSI benefits, for example, if an impairment causes an inability to work of virtually any duration.

A. The Commissioner Has Reasonably Construed The Act To Require That A Claimant's Inability To Engage In Substantial Gainful Activity Last For 12 Months

Where an Act of Congress speaks clearly "to the precise question at issue," the court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 843 (1984). If "the statute is silent or ambiguous with respect to the specific issue," however, the court must sustain an agency's interpretation if it is "based on a permissible construction of the statute." *Id.* at 843; see also *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 457 (1998) ("If the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight"). That deference is particularly appropriate where, as here, Congress has accorded the Commissioner power to issue legislative rules, 42 U.S.C. 405(a) (rulemaking authority); see *Sullivan* v. *Zebley*, 493 U.S. 521, 528 (1990); *Yuckert*, 482 U.S. at 145; *Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983), made applicable to Title XVI by 42 U.S.C. 1383(d)(1); and to issue written guidelines for state agencies to follow in adjudicating claims, 42 U.S.C. 421(a)(2) (requiring States to make disability determinations "in accordance with * * * the standards and criteria contained in regulations or other written guidelines of the Commissioner of Social Security"), made applicable to Title XVI by 42 U.S.C. 1383b(a). In such circumstances, the standards adopted by the Commissioner have "legislative effect" and are entitled "to more than mere deference or weight." *Batterton* v. *Francis*, 432 U.S. 416, 425, 426 (1977) (addressing statute requiring States to comply "with standards prescribed by the Secretary"). Rather, the Commissioner's construction must be "given controlling weight" unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Zebley*, 493 U.S. at 528 (quoting *Chevron*, 467 U.S. at 843-844). Moreover, as this Court has recognized, the "Social Security Act is among the most intricate ever drafted by Congress. * * * Perhaps appreciating the complexity of what it had wrought, Congress conferred on the [Commissioner] exceptionally broad authority to prescribe standards for applying certain sections of the Act." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 43 (1981). Under these principles, the Commissioner's interpretation of the Act should be sustained.

1. The text of the Social Security Act does not directly resolve the precise question before the Court. The Act defines disability in part as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A). By its terms, Section 423(d)(1)(A) requires that the *impairment* have lasted or be expected to last 12 months (or result in death). But Section 423(d)(1)(A) does not speak directly to whether the impairment must persist during those 12 months at any particular level of severity—in particular, whether it must be sufficiently severe to prevent substantial gainful activity. Nor does it specify how long the *disability*—the inability to work "by reason of" the impairment—must last. On those issues, Section 423(d)(1)(A) is ambiguous.

In 1967, Congress added Section 423(d)(2)(A) to supplement and clarify the basic definition of "disability." Section 423(d)(2)(A) provides that, "[f]or purposes of paragraph [d](1)(A)"—the basic definition of disability—a claimant "shall be determined to be under a disability *only if* his physical or mental impairment or impairments are of such

severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A) (emphasis added). By amending the Act to add Section 423(d)(2)(A), Congress made it clear that, for purposes of disability determinations, it is not sufficient that there merely be some sort of discernible impairment. Instead, there must be an impairment that is sufficiently severe to preclude any substantial gainful activity.

2. The Commissioner has consistently construed Section 423(d) to mean that a claimant is not entitled to disability benefits unless, during the 12 months for which the impairment has persisted or can be expected to persist, the impairment is so severe that it precludes substantial gainful activity. After the 1956 amendments, in which Congress first afforded benefits for insured workers who were disabled by impairments of "long-continued and indefinite duration," the Commissioner immediately interpreted the Act as requiring the impairment to persist at a disabling level of severity for the specified duration ("long-continued and indefinite"). The Commissioner's regulations, issued in 1957, see 22 Fed. Reg. 4362, 4363, provided that an impairment is of long-continued and indefinite duration under the Act only if "it cannot reasonably be anticipated that the impairment will, in the foreseeable future, be *so diminished as no longer to prevent substantial gainful activity.*" 20 C.F.R. 404.1502(f) (1960 Supp.) (emphasis added); 20 C.F.R. 404.1502(f) (1961) (same); see also 20 C.F.R. 404.1520(g) (1961) ("An individual will be deemed not under a disability if, with reasonable effort and safety to himself, the impairment can be diminished to the extent that the individual will not be prevented by the impairment from engaging in any substantial gainful activity."). The Commissioner's written instructions to the States, which must make disability determinations "in accordance with * * * the standards and criteria contained

in" the Commissioner's "written guidelines," 42 U.S.C. 421(a)(1) and (2), also made that clear. See OASI Disability Insurance Letter No. 39 (Pt. V of Disability Insurance State Manual), at 1 (Jan. 22, 1957) ("long-continued and indefinite duration" requirement refers to the "expected duration of the medical impairment" at a "level of severity sufficient to preclude SGA").

After Congress changed the duration requirement from "long-continued and indefinite" to "not less than 12 months" in 1965, the Commissioner continued to require that the impairment persist at a disabling level of severity for the specified period. The impairment, the Commissioner explained, must be "expected to last *at a disabling level* for 12 months or more from onset." SSA Disability Insurance Letter No. III-6 (Pt. III of Disability Insurance State Manual), at 4 (Nov. 19, 1965) (emphasis added); Disability Insurance State Manual, § 316 (Sept. 9, 1965) ("Duration of impairment refers to that period of time during which an individual is *continuously unable to engage in substantial gainful activity* because of a medically determinable physical or mental impairment.") (emphasis added).[7]

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[7] See also Disability State Insurance Manual, § 316.1-A (Sept. 9, 1965) ("Where the claimant is engaging in SGA, or is held to be able to engage in SGA * * *, a finding of disability may be made if the impairment prevented the claimant from engaging in SGA for at least 12 consecutive months."); *id.* at § 316.1-C (where adjudication occurs "before the impairment has lasted 12 months," the decisionmaker must examine the evidence to determine "whether the impairment will continue to prevent the individual from engaging in SGA for the additional number of months needed to make up the required 12 months duration"); SSA, Concepts of Disability and Principles of Evaluation, at 3 (Jan. 1966) (Because "the disabling impairment must have lasted or be expected to last 12 continuous months from onset," an "impairment which became incapacitating on April 12 must have continued or be expected to continue at a disabling level into April 11 of the following year."); SSA Disability Insurance Letter No. II-24 (Pt. II of Disability Insurance State Manual), at 4 (Aug. 30, 1965) ("In all cases, use existing guides for determining whether the claimant is able to engage in any SGA since the 1965 Amendments made

The Commissioner has never wavered from that construction. See, *e.g.*, Social Security Ruling (SSR) 73-7c, at 122-123 (Cum. ed. 1971-1975) (adopting construction, set forth in *Alexander* v. *Richardson*, 451 F.2d 1185, 1186 (10th Cir. 1971), cert. denied, 407 U.S. 911 (1972), under which both "components of disability"—the impairment and the resulting inability to work—"must exist at the same time to satisfy the twelve month duration requirement"); SSR 82-52, at 328 (Cum. ed. 1981-1985) ("In considering 'duration,' it is the inability to engage in SGA because of the impairment that must last the required 12-month period."); 20 C.F.R. 404.1520(b) (2000) (when the claimant is "working and the work [he is] doing is substantial gainful activity," the agency "will find that [the claimant is] not disabled regardless of [his] medical condition or [his] age, education, and work experience."); 20 C.F.R. 404.1520(f) (2000) ("Your impairment(s) must prevent you from doing any other work."); 20 C.F.R. 404.1571 (2000) ("If you are able to engage in substantial gainful activity, we will find that you are not disabled."). Thus, as the Commissioner explained in promulgating the most recent regulations, it has been the agency's "longstanding" position that "the duration requirement to establish disability will not be met" if the "impairment no

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no change with respect to the issue of severity. * * * [U]nder the 1965 Amendments the impairment, which prevents SGA, must have lasted or be expected to last 12 months from onset of disability. * * * An individual with a disabling impairment * * * would be found under a disability if he is undergoing therapy * * * and his disability, nonetheless, has lasted or is expected to last 12 months from onset. If it is found that the claimant is able to engage in SGA in accordance with existing criteria, a finding of 'no disability' should be made. If it is found that, although the claimant is currently unable to engage in SGA, in accordance with existing criteria, he is expected to be able to engage in SGA within 12 months from onset, a finding of 'no disability' should be made."); SSA Disability Insurance Letter No. III-6, *supra*, at 1, 4. 6 (1965 amendments "made no change in the severity requirement"; thus impairments must be "expected to last at a disabling level for 12 months or more from onset.").

longer prevents substantial gainful activity" before the 12-month period has lapsed. 65 Fed. Reg. at 42,774.[8]

3. The Commissioner's construction is fully supported by the Act's text and structure. Section 423(d)(1)(A) requires not only that there be an underlying "impairment" lasting the specified duration, but also an inability to engage in substantial gainful activity "by reason of" that impairment. 42 U.S.C. 423(d)(1)(A). The impairment and the resulting inability to work thus are inextricably linked. Furthermore, Section 423(d)(2)(A) expressly provides that a claimant may be found disabled "only if" his impairment is of "such severity" as to render him unable to perform any substantial gainful work that exists in the national economy. It therefore is entirely reasonable for the Commissioner to construe the Act to require that the impairment that must last at least 12 months under Section 423(d)(1)(A) be one that is of "such severity" as to satisfy Section 423(d)(2)(A) during those 12 months.

Indeed, prior to the Fourth Circuit's decision in this case, the courts of appeals had repeatedly upheld the Commissioner's interpretation of Section 423(d) to require that both the underlying impairment and the resulting inability to engage in substantial gainful activity must have lasted or be expected to last for the statutory 12-month period. For example, in *Alexander*, 451 F.2d at 1186, the Tenth Circuit rejected the reasoning that was adopted by the Fourth Circuit in this case, and affirmed the Commissioner's decision denying benefits because the "disability extended for a period of less than twelve months, although there was an impairment

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[8] A claimant's *unsuccessful* attempt to return to work before the expiration of the 12-month disability period will not prevent the claimant from being entitled to disability benefits. The Commissioner "will disregard work attempts lasting 6 months or less that do not demonstrate the ability to perform sustained substantial gainful activity even if the unsuccessful work attempt occurs prior to adjudication of the claim for benefits." 65 Fed. Reg. at 42,780. See 20 C.F.R. 404.1574(c), 404.1575(d) (2001).

which lasted for more than one year." *Id.* at 1186. The court explained:

> To recover disability benefits under the Act an applicant must be unable to engage in any substantial gainful activity. Disability is established by showing a medically determinable mental or physical impairment which prevents [the claimant from] engaging in any gainful activity. Inability to engage in any gainful activity and the impairment which causes it cannot be separated. The two components of disability must exist at the same time to satisfy the twelve month duration requirement.

Ibid. Other courts of appeals have agreed. See *Titus* v. *Sullivan*, 4 F.3d 590, 594 (8th Cir. 1993) ("We agree with the district court that the interpretation of 'duration of impairment' was settled in *Alexander* v. *Richardson*, 451 F.2d 1185 (10th Cir. 1971)."). See also *McDonald* v. *Bowen*, 818 F.2d 559, 564 (7th Cir. 1986) (the "disability" must be "expected to last at least twelve continuous months from its alleged onset date; otherwise she will not receive benefits"); *Estep* v. *Richardson*, 459 F.2d 1015, 1016 (4th Cir. 1972) ("To obtain disability benefits under the Act a claimant must have an impairment which prevents him from engaging in substantial gainful activity for a period of at least 12 months.").

4. The Commissioner's construction of the Act is not only consistent with the Act's text but is also firmly grounded in common sense. Workers often may have impairments that last longer than a year, but that prevent them from being able to work only for a much shorter time. See, *e.g.*, *Alexander*, 451 F.2d at 1186 ("For example, an applicant may have an injury from which he has lost one of his hands. The result is a physical impairment for the remainder of his life, but if he is able to engage in any gainful activities within a year from his injury he is not entitled to benefits."). In fact, many relatively common ailments—from back injuries, to high blood pressure, to carpal tunnel syndrome—may predictably last a

lifetime, but may preclude the individual from working only briefly or for relatively brief, intermittent periods. Titles II and XVI of the Act, however, were designed to provide *disability* benefits to persons who cannot engage in substantial gainful activity, not to provide *impairment* benefits to those who can.

Congress originally enacted the disability insurance program to fill a "gap" in Social Security's retirement system by providing benefits to those "forced into premature *retirement*" before age 65 "by reason of a *permanent and total* disability." H.R. Rep. No. 1189, *supra*, at 3 (emphasis added). See pp. 2, 19, *supra*; see also pp. 39-40, *infra* (discussing Congress's rejection of benefits for short-term disabilities). It is thus the sustained inability to work on account of an impairment, not the impairment alone without regard to its effect on the claimant, that gives rise to the need and justification for the payment of disability benefits.

5. The court of appeals nevertheless rejected the Commissioner's construction, holding that the definition of "disability" in Section 423(d)(1)(A) *precludes* the Commissioner from construing the Act to require that the inability to engage in substantial gainful activity have lasted, or be expected to last, at least 12 months. The court of appeals, however, did not identify any provision of the Act that expressly states that there is no "duration requirement for the inability to engage in substantial gainful activity." Pet. App. 7a. It did not identify any provision stating that the impairment need not persist at a disabling level of severity for the statutory 12-month period. And it offered no plausible reason why Congress would have insisted that the underlying impairment last for 12 months but not the claimant's inability to work "by reason of" that impairment. Instead, the court relied on the observation that, as a matter of grammar, the phrase "which has lasted or can be expected to last for not less than 12 months" in Section 423(d)(1)(A) modifies the word "impairment," and not the phrase "inability to engage

in any substantial gainful activity." *Id.* at 7a-8a. Accordingly, the court declared, there is no duration requirement for the disability, *id.* at 7a, and a claimant is disabled if he has an impairment that has lasted or is expected to last 12 months, "even if the inability to engage in substantial gainful activity" on account of the impairment "does not * * * actually persist for twelve months." *Id.* at 8a.

As a matter of grammar, the court of appeals is correct that the phrase "which has lasted or can be expected to last" in Section 423(d)(1)(A) modifies the word "impairment." Section 423(d)(1)(A) therefore does expressly require that the *impairment* last at least 12 months. But the court of appeals erred in leaping from that unremarkable observation to the remarkable conclusion that Section 423(d)(1)(A) affirmatively *precludes* a construction under which the disability —the inability to engage in substantial gainful activity "by reason of" the impairment—must also have lasted or be expected to last 12 months. In fact, the court of appeals' grammatical parsing of Section 423(d)(1)(A) shows no more than that, while that provision clearly addresses how long the impairment must last, it is ambiguous regarding how *severe* the impairment must be during that 12-month period. In other words, it does not specifically address whether the impairment must persist with such severity as to preclude all substantial gainful activity during the qualifying period—much less foreclose the Commissioner from construing the Act to embody such a requirement. Cf. *Mourning* v. *Family Publ'n Serv., Inc.*, 411 U.S. 356, 372-373 (1973). Because the text of Section 423(d)(1)(A) does not unambiguously resolve this issue, it is for the Commissioner, not the court of appeals, to choose among reasonable constructions. See *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 703-704 (1991).[9]

[9] The court of appeals' imposition of its own construction appears implicitly to rest on an application of the maxim *expressio unius est exclusio alterius*. In particular, the court assumed that Congress, by expressly requiring that the *impairment* last 12 months, implicitly precluded any construction of the Act that requires any resulting *disability* to last that long as well. The maxim, however, has no application here. First, Congress's provision of an express duration period for an impairment simply does not speak to, much less impliedly preclude, the Commissioner from addressing how *severe* the impairment must be during that duration. Indeed, the statute itself seems to anticipate that the impairment and the inability to engage in substantial gainful activity "by reason of" the impairment will be coterminous. See pp. 23-24, 27-28, *supra*.

Second, as other courts of appeals have recognized, application of the *expressio unius* canon is not appropriate in cases (such as this one) that involve an administrative agency's construction of a statute. *Texas Rural Legal Aid, Inc.* v. *Legal Servs. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) ("Whatever its usefulness in other circumstances * * * th[e] canon has little force in the administrative setting."); *Whetsel* v. *Network Property Servs., LLC*, 246 F.3d 897, 902 (7th Cir. 2001) ("[T]he canon of *expressio unius est exclusio alterius* has reduced force in the context of interpreting agency administered regulations and will not necessarily prevent the regulation from being considered ambiguous"). The reason is that an agency's interpretation must be given deference unless Congress has "directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842, and "the *expressio unius* maxim, unsupported by arguments based on the statute's structure or legislative history, 'is simply too thin a reed to support the conclusion that Congress has clearly resolved [an] issue.'" *Martini* v. *Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1343 (D.C. Cir. 1999) (quoting *Texas Rural Legal Aid*, 940 F.2d at 694), cert. dismissed, 528 U.S. 1147 (2000); see also *Cheney R.R.* v. *ICC*, 902 F.2d 66, 69 (D.C. Cir.), cert. denied, 498 U.S. 985 (1990); *Mobile Communications Corp.* v. *FCC*, 77 F.3d 1399, 1404-1405 (D.C. Cir.), cert. denied, 519 U.S. 823 (1996); *Amax Land Co.* v. *Quarterman*, 181 F.3d 1356, 1365 (D.C. Cir. 1999). This case proves that point. Here, the legislative history shows that Congress not only lacked an intent to preclude the Commissioner's interpretation and implementation, but actually contemplated them as based on the proper understanding of the Act. See pp. 20-21, *supra*; pp. 32-39, *infra*.

More fundamentally, the court of appeals' analysis wholly ignores Section 423(d)(2)(A), which gives additional content to the definition of "disability." Section 423(d)(2)(A) specifically declares that an individual is disabled "only if" the impairment precludes him from engaging in substantial gainful activity. See pp. 23-24, *supra*. The Commissioner has consistently concluded that the severity requirement codified in Section 423(d)(2)(A) applies throughout the 12-month period

during which the impairment must persist. That construction is directly supported by the text of Section 423(d)(1)(A), which requires not merely an impairment that has lasted or can be expected to last at least 12 months, but also an inability to engage in substantial gainful activity "by reason of" that 12-month long impairment. Congress, moreover, has endorsed the Commissioner's construction. When it amended the Act to add Section 423(d)(2)(A), it "reaffirm[ed]" that an individual "who does substantial gainful work despite an impairment" is "not disabled for purposes of establishing a period of disability or for social security benefits based on disability during any period in which such work is performed." S. Rep. No. 744, *supra*, at 49 (emphasis added). The court of appeals, by contrast, pointed to nothing in the Act that specifically precludes the Commissioner's construction.[10]

B. The Commissioner's Interpretation Is Supported By the History Of Congress's Amendments To The Act

Even if the text of the Act does not compel the conclusion that Congress intended to impose a duration requirement for the disability—*i.e.*, to require that the impairment be of disabling severity in each of the 12 months during which it has persisted or can be expected to persist—the history of the

[10] The court of appeals' decision also places a gloss on the Act that seems unlikely in view of its structure. Section 423(d)(1)(A) by its terms speaks of an inability to engage in substantial gainful activity by reason of an "impairment" that either "can be expected to result in death" *or* "has lasted or can be expected to last" for at least 12 months. The first alternative obviously implies an element of great severity; it is therefore sensible to read the second alternative, the requirement that the impairment have lasted or be expected to last for 12 months, as encompassing an element of substantial severity as well. By contrast, it is implausible to suppose that Congress commanded an award of benefits whenever a disabling impairment is so severe that it is expected to cause death, *and* whenever the impairment is only briefly disabling but persists for 12 months in a relatively inconsequential form. Yet that is precisely the construction adopted by the decision below.

Act and its implementation does. It is well established that the proper construction of an Act of Congress may be informed by pre-existing administrative constructions of which Congress was aware. Cf. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). Here, over a period that spans more than four decades, Congress repeatedly acknowledged the Commissioner's construction, repeatedly endorsed it when amending the Act, and repeatedly adopted that construction itself.

1. When Congress first established the disability insurance program in 1956, it provided disability benefits to covered workers who were unable to engage in substantial gainful activity on account of an impairment of a "long-continued and indefinite duration." See Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815; 42 U.S.C. 423(c)(2) (1958). Anticipating the Commissioner's construction, Congress understood that provision as requiring "that the disability," which was statutorily defined as the inability to work on account of the impairment, "be of long-continued and indefinite duration." H.R. Rep. No. 1189, *supra*, at 5. Thus, the House Report explained, "an individual who is able to engage in any substantial gainful activity will not be entitled to disability-insurance benefits." *Ibid.* Consistent with the House Report, the Commissioner's regulations under Section 405(a) and "written guidance" issued to the state agencies pursuant to 42 U.S.C. 421(a)(1) and (2) made it clear that the "long-continued and indefinite duration" requirement refers to the expected duration of the medical impairment at a level of severity sufficient to preclude substantial gainful activity. See pp. 24-25, *supra* (citing the Commissioner's 1957 and 1961 regulations, as well as the 1957 OASI Disability Insurance Letter No. 39).

That construction is consistent not merely with the text and legislative history of the 1956 amendments themselves, but also with the "disability freeze" provisions of the Social Security Amendments of 1954, ch. 1206, § 106, 68 Stat. 1079,

1080, from which the language of the 1956 amendments was drawn. The disability freeze provisions sought to ensure that individuals who had worked a sufficient amount of time to qualify for retirement benefits did not find their entitlements substantially reduced because of a sustained period of disability—*i.e.*, inability to engage in substantial gainful activity by reason of an impairment—prior to retirement. That could occur before 1954 because benefits were calculated as a percentage of the worker's average earnings. The 1954 disability freeze provisions excluded from consideration the periods during which the worker was unable to engage in substantial gainful activity because of a disability. The committee reports on the 1954 amendments reveal an expectation that the *inability to work* had to be long-lasting before the disability freeze provisions could be invoked. See H.R. Rep. No. 1698, 83d Cong., 2d Sess. 2-3 (1954) ("Long periods of absence from covered work generally indicate that the individual has not been dependent on his own earnings from work for support, and benefits are properly reduced or not paid in such circumstances," except in "the case of workers who are out of employment by reason of a total disability lasting for an extended period of time."); S. Rep. No. 1987, 83d Cong., 2d Sess. 20 (1954) (disability freeze redresses problem that, under present law, a worker's "old-age and survivors insurance rights are impaired or may be lost entirely when workers have periods of total disability before reaching retirement age.").[11]

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[11] The 1954 committee reports also state that the "long-continued and indefinite duration" requirement "refers only to the duration of the impairment and does not require a prediction of a continued inability to work." H.R. Rep. No. 1698, *supra*, at 23; S. Rep. No. 1987, *supra*, at 21. Those statements, however, are inconsistent with Congress's expectation that the period of disability would be lengthy, and were subsequently refuted by the reports accompanying the enactment of Section 423(d)(1)(A) in 1956 and subsequent amendments, see p. 33, *supra*; pp. 35-39, *infra*, which express the expectation that the disability must last as long as the impairment. Moreover, in 1954, when the disability freeze provisions were enacted, any distinction between the inability to engage in substantial gainful activity and the impairment giving rise to it might have been expected to be largely without significance insofar as duration was concerned. Before the 1954 amendments, benefits would be reduced or placed at risk when the worker's *earnings* declined. If the impairment did not preclude substantial gainful activity and the worker's earnings did not decline as a result, there would have been no need to invoke the disability freeze provisions. Moreover, under Section 102(b)(2) of the 1954 Amendments, the Secretary could exclude up to four years of a claimant's work history from the calculation of the claimant's "average monthly wage" if doing so "would produce the highest primary insurance amount." 68 Stat. 1063. That provision, Secretary of Health, Education, and Welfare Oveta Culp Hobby explained, protected workers who had "short periods of absence from covered work." *The Social Security Amendments of 1954: Hearings Before the House Comm. on Ways and Means*, 83d Cong., 2d Sess. 68 (1954). The disability freeze provisions were thus necessary only to protect the rights of workers who were forced to spend "long periods out of the labor force" due to "a totally disabling condition." *Ibid.*

2. When Congress amended Section 423(d) in the Social Security Amendments of 1965, Pub. L. No. 89-97, § 303(a)(1), 79 Stat. 366, it was well aware of the Commissioner's construction. The House Report on the bill noted that, "[u]nder present law," benefits are "payable only if the worker's *disability*"—*i.e.*, the inability to engage in substantial gainful activity by reason of the impairment—"is expected * * * to be of long-continued and indefinite duration." H.R. Rep. No. 213, 89th Cong., 1st Sess. 88 (1965) (emphasis added). Although Congress changed the duration requirement from "long-continued and indefinite" to "not less than 12 months," Congress declined to disturb the requirement that the impairment persist at a disabling level of severity for the specified period. Thus, the Senate Report explained that the 1965 amendments "eliminate the present requirement that a worker's disability must be expected to be of long-continued and indefinite duration, and instead provide that an insured worker would be eligible for disability benefits if he has been *under a disability* which * * * has lasted or can be expected to last for a continuous period of *not less than 12 cal-*

endar months." S. Rep. No. 404, *supra*, at 13 (emphasis added). The Senate Report further explained that the Act, as amended, "would provide for the payment of disability benefits for an insured worker who has been or can be expected to be *totally disabled* throughout a *continuous period of 12 calendar months.*" *Id.* at 98 (emphasis added); see also *id.* at 13 (an insured worker is "eligible for disability benefits if he has been *under a disability* which can be expected to last for a continuous period of not less than 12 calendar months" (emphasis added)).[12]

"It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). That principle is of particular force where, as here, the legislative history expressly acknowledges the agency's construction and manifests an intent to preserve it.[13]

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[12] See also S. Rep. No. 408, 96th Cong., 1st Sess. 13 (1979) (explaining that, in 1965, "the definition requiring that a disability be of 'long-continued and indefinite duration' was changed to permit benefits for *disabilities* expected to last at least 12 months." (emphasis added)).

[13] Congress was specifically advised of the Commissioner's construction and the effect it would have on the proposed legislation. Testifying before a congressional committee on the then-pending proposal to replace the "long-continued and indefinite duration" requirement with a 6-month duration requirement, Commissioner of Social Security Robert M. Ball explained that the bill would "drop[] the requirement that we make a prognosis that the *disability* will last for a long and indefinite period." *Hearings on H.R. 6675 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess., Pt. I, at 153-154 (1965) (emphasis added). The people "picked up by" changing the "long-continued and indefinite" duration requirement to a six-month duration requirement, he added, would be those "whose condition is such that there is no question about the fact that they *can't work* for [the proposed] 6 month period." *Ibid.* (emphasis added).

3. a. Congress has since repeatedly reaffirmed the Commissioner's construction. Shortly after the 1965 amendments, the Commissioner issued revised criteria specifying that the impairment must have prevented or be expected to prevent the performance of substantial gainful activity throughout the 12-month period. See pp. 25-26 & note 7, *supra*. When Congress amended the Act in 1967 to supplement the basic definition of "disability," it re-emphasized in the text of the amendment itself that the impairment must be of "such severity" so as to preclude the claimant from "engag[ing] in any * * * kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A). And far from suggesting that Congress was unaware or opposed to the Commissioner's application of that severity requirement when determining whether the disability has lasted or can be expected to last the requisite 12-month duration, Congress endorsed that approach: "[A]n individual who does substantial gainful work despite an impairment or impairments" that otherwise might be disabling, the Senate Report "reaffirm[ed]," is "not disabled for purposes of establishing a period of disability or for social security benefits based on disability during any period in which such work is performed." S. Rep. No. 744, *supra*, at 49; S. Rep. No. 544, 90th Cong., 1st Sess. 31 (1967) (same).

b. When Congress established the SSI program in Title XVI of the Act in 1972 to provide financial assistance to needy disabled persons, it incorporated the definition of "disability" from Title II into the SSI program. Specifically, acting against the settled background of the Commissioner's longstanding construction of Sections 423(d)(1)(A) and (d)(2)(A), Congress enacted those provisions virtually verbatim in Title XVI. See 42 U.S.C. 1382c(a)(3)(A) (1994 & Supp. V 1999); 42 U.S.C. 1382c(a)(3)(B). Just as "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," it likewise can be pre-

sumed to have done so when it "adopts a new law incorporating sections of [that] prior law." *Lorillard*, 434 U.S. at 580, 581. In incorporating the language of Section 423 into Title XVI, moreover, Congress expressly recognized that, under Section 423, "[n]o benefit is payable * * * unless the *disability* is expected to last (or has lasted) at least 12 consecutive months." H.R. Rep. No. 231, *supra*, at 56 (emphasis added). And it made clear that that rule "would not be changed" by the 1972 amendments. *Ibid.*; see also p. 42, *infra* (explaining further changes made by the 1972 amendments).

c. Congress reaffirmed the Commissioner's construction again in 1984. Following the 1972 amendments, the Commissioner reiterated, through a series of Social Security Rulings, the requirement that the impairment prevent or be expected to prevent the performance of substantial gainful activity during the entire 12-month disability period. See, *e.g.*, SSR 73-7c and SSR 82-52 (cited and quoted p. 26, *supra*). The Commissioner also incorporated the severity requirement into the regulatory five-step sequential evaluation process. See *Yuckert*, 482 U.S. at 147-148. Under that five-step process, a claim that is adjudicated more than 12-months after onset of the alleged disability will be denied if the claimant has returned to substantial gainful activity within the 12-month period. See H.R. Rep. No. 618, 98th Cong., 2d Sess. 6-9 (1984); 20 C.F.R. 404.1520 (1982). After examining that process and clarifying the criteria that must be used in evaluating disabilities, see Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794, Congress emphasized that it did not "intend to alter the current definition" of disability. H.R. Rep. No. 618, *supra*, at 6. To the contrary, Congress "reaffirm[ed] that the purpose of the disability insurance program is to provide benefits only for those who are unable to work." *Id.* at 7; see also *id.* at 8 ("emphasiz[ing] * * * the intent of Congress that disability benefits should be granted to those who are

unable to work because of a medically determinable impairment").

4. The more than four-decade history of the definition of disability thus makes one thing unmistakable: Congress specifically contemplated the Commissioner's construction of the Act, endorsed it, and reaffirmed it. In view of that history, the Commissioner's construction is not merely a "reasonable" or "permissible" interpretation of the Act. *Chevron*, 467 U.S. at 842-843, 844; *Sullivan* v. *Everhart*, 494 U.S. 83, 89 (1990) ("rational and consistent with the statute"). It is the *most* reasonable interpretation, and the one that Congress intended.

C. The Court Of Appeals' Construction Creates Precisely The Short-Term Disability Program That Congress Chose Not To Enact

1. Congress created Title II's disability insurance program in 1956 to fill a perceived "gap" in the Social Security retirement system by providing benefits to "workers who are forced into premature retirement" before age 65 by "reason of a permanent and total disability." H.R. Rep. No. 1189, *supra*, at 3 (emphasis added). Congress initially ensured that the program achieved that limited goal by requiring that the disabling impairment be of long-continued and indefinite duration. When Congress in 1965 changed the duration requirement from long-continued and indefinite to not less than 12 months, Congress chose 12 months because it was a reasonable proxy for permanence. "[E]xperience under the disability program" between 1956 and 1965, Congress determined, had "demonstrated [that] in the great majority of cases in which total disability continues for at least a year the disability is essentially permanent." S. Rep. No. 404, *supra*, at 99. Congress, in fact, rejected a shorter six-month period, proposed in the House of Representatives, because it "could result in the payment of disability benefits in cases of short-term, temporary disability." *Id.* at 98-99. The Senate Report explained that, in order to prevent the

payment of benefits in cases of such temporary disabilities, it is "necessary to require that a worker be *under a disability* for a somewhat longer period than 6 months in order to qualify for disability benefits." *Ibid.* (emphasis added).

The court of appeals' decision cannot be reconciled with Congress's deliberate decision not to provide benefits "in cases of short-term, temporary disability." S. Rep. No. 404, *supra*, at 99. As the court of appeals acknowledged, under its construction of the statutory language, no "duration requirement for the inability to engage in substantial gainful activity * * * exists." Pet. App. 7a. As a result, the Commissioner would have to award Title II insurance benefits to any claimants who are unable to work for only five months (the duration of the waiting period provided by 42 U.S.C. 423(c)(2)(A)). Moreover, because Title XVI does not have a waiting period, the Commissioner would be required to pay Title XVI SSI disability benefits to claimants who suffer an inability to engage in substantial gainful activity of virtually *any* duration, which would create a standard of eligibility for benefits that is far more lenient even than the five-month standard that the court of appeals fashioned for Title II. The court of appeals nowhere explained why Congress would have intended such a result; nor did it explain why that result is consistent with Congress's repeated decision to cover only long-term disabilities.

2. Perhaps recognizing that defect in the decision below, respondent has argued that the five-month waiting period provided by 42 U.S.C. 423(c)(2)(A) obviates the inconsistency between the court of appeals' decision and Congress's deliberate decision not to authorize benefits for short-term disabilities. See Br. in Opp. 11, 17-18. But Section 423(c)(2)(A) hardly eliminates that conflict. For one thing, as we have pointed out, the waiting period applies only to Title II's disability insurance program, 42 U.S.C. 401 *et seq.*, and does not apply to Title XVI's SSI program.

Even with respect to Title II, the waiting period hardly answers the concern. As explained above, Congress concluded in 1965 that even a *six-month* inability to work was the sort of short-term disability that should not qualify for benefits. See pp. 39-40, *supra*. For that very reason, Congress chose to require that the "worker be under a disability for a somewhat longer period," namely one year. See p. 40, *supra*. That judgment by Congress refutes the court of appeals' apparent assumption that the five-month waiting period furnishes the only protection that Congress included in the Act against converting the Title II disability program into a benefits program for short-term disabilities.

In any event, reliance on the five-month waiting period of 42 U.S.C. 423(c) misconstrues both the meaning and purpose of that provision. The waiting period provided by Section 423(c)(2)(A) does not address *whether* an individual suffers from a "disability"—an impairment of sufficient severity and duration to entitle him to benefits. Instead, it provides that a claimant who concededly *is* disabled within the meaning of the Act nevertheless is not entitled to benefits and cannot receive payments for the first five months of the period of disability. The five-month waiting period serves three purposes. First, it helps to save public resources and to lessen the drain on the Trust Fund. Second, it assists in administration by allowing the development of additional evidence; in some cases, Congress explained, the waiting period permits "temporary conditions to be corrected or to show definite signs of probable recovery" before potentially inappropriate payments are made. H.R. Rep. No. 1189, *supra*, at 6. Third, like a deductible on an insurance policy, it deters the submission of potentially insubstantial or unmeritorious claims. "[T]he fact that the worker frequently will be without income during [the waiting] period * * * would make it unprofitable for a person who could work not to do so." *Ibid.* The waiting period thus identifies the portion of the disability period during which a claimant will not receive benefits

despite being disabled and unable to work. It does not specify the length of time during which an individual must be unable to engage in substantial gainful activity in order to be found disabled, and thus eligible for benefits, in the first place.

Congress has recognized as much, and has consistently treated the waiting period and the disability period as distinct. For example, when Congress shortened the waiting period from six months to five in 1972, the House Report specifically noted that altering the waiting period would not shorten the required duration of the disability itself. Notwithstanding the one-month decrease in the waiting period, the House Report explained, "[n]o benefit is payable * * * unless the *disability* is expected to last (or has lasted) *at least 12 consecutive months* or to result in death." H.R. Rep. No. 231, *supra*, at 56 (emphasis added). Respondent's attempt to treat the waiting period as a replacement for the duration and severity requirements cannot be reconciled with either the text of the Act or Congress's manifest intent in enacting it.

II. SECTION 422(c)(2) DOES NOT PROVIDE A "TRIAL WORK" PERIOD WHERE THE CLAIMANT RETURNS TO SUBSTANTIAL GAINFUL ACTIVITY WITHIN 12 MONTHS OF THE ALLEGED ONSET OF HIS DISABILITY AND BEFORE BEING AWARDED BENEFITS

The court of appeals also erred in concluding that respondent was entitled to a "trial work period" under 42 U.S.C. 422(c) when the evidence at the time his claim was adjudicated showed that he had returned to substantial gainful activity within 12 months of the alleged onset of his disability. Under Section 422(c), a beneficiary who is entitled to benefits does not lose that entitlement by performing substantial gainful activity during the nine-month trial work period. The "period of trial work shall begin with the month in which [the claimant] becomes entitled to disability insurance bene-

fits." 42 U.S.C. 422(c)(3). That period ends after nine months of substantial gainful activity, or termination of the disability, whichever comes first. 42 U.S.C. 422(c)(4). "[A]ny services rendered by an individual during a period of trial work" are "deemed not to have been rendered by such individual in determining whether his disability has ceased in a month during such period." 42 U.S.C. 422(c)(2).

A. Reversal Of The Court Of Appeals' Ruling Concerning The Necessary Duration Of The Inability To Engage In Substantial Gainful Activity Requires Reversal Of Its Ruling On The Trial Work Issue

In this case, the court of appeals held that respondent was entitled to a trial work period because he became entitled to benefits under Title II after he was unable to engage in substantial gainful activity during the five-month waiting period. "[W]hether [respondent] is entitled to a trial work period, in light of his return to part-time work in May 1995 and SGA in October 1995," the court stated, "is conclusively settled by the determination that [respondent] was disabled and entitled to disability benefits" after that five-month period. Pet. App. 9a; see also *id.* at 10a (relying on the conclusion that respondent "was entitled to disability benefits as of April 1995"). For the reasons given in Point I above, however, the court of appeals erred in concluding that respondent was entitled to benefits merely because his underlying *impairment* lasted (or was expected to last) 12 months. Instead, the Commissioner properly determined that respondent was not entitled to disability benefits because, at the time his claim was adjudicated, his impairment had neither lasted nor was expected to last for the required minimum 12-month period at a level of severity that precluded substantial gainful activity. For that reason alone, the court of appeals erred on the trial work issue.

B. In Any Event, The Court Of Appeals Erred In Its Interpretation Of 42 U.S.C. 422(c) And 423(d)(1)(A)

1. Even putting that error to one side, the court of appeals' analysis (see Pet. App. 10a-13a) fundamentally misinterprets Section 422(c) and the "can be expected to last" language in Section 423(d)(1)(A), erroneously invalidating the Commissioner's trial work regulations as a result. The Commissioner has consistently construed Sections 422 and 423 as making a trial work period available only if the impairment has already precluded substantial gainful activity for 12 continuous months, or where there has been a determination that it can be expected to do so. See SSR 82-52; 20 C.F.R. 404.1592(d)(2) (as added by 65 Fed. Reg. at 42,787) ("You are not entitled to a trial work period" if "you perform work demonstrating the ability to engage in substantial gainful activity within 12 months of the onset * * * and before the date of any notice of determination or decision finding that you are disabled."). The Commissioner explained:

> Because section [422(c)] provides that a trial work period shall begin with the month in which a person becomes entitled to title II disability benefits, a claimant who does not become entitled to disability benefits cannot receive a trial work period. Under our interpretation of the duration requirement [in Section 423(d)(1)(A)], a person cannot be found to be under a disability if he or she performs work demonstrating the ability to perform substantial gainful activity within 12 months after onset and before we have issued any notice of determination or decision finding disability. * * * On the other hand, if a claimant returns to work before we have made a determination or decision finding disability, but more than 12 months from onset, the duration requirement may be satisfied * * *, the claimant may become entitled to benefits, and the work may be protected by the trial work period even though the work began prior to a finding of disability.

65 Fed. Reg. at 42,774.

That construction is fully supported by the Act's text and history. The Commissioner has concluded that, when determining whether an impairment preventing substantial gainful activity has lasted or can be expected to last for the required 12-month period, the decisionmaker should consider all evidence available at the time of the disability determination. See 65 Fed. Reg. at 42,780 (expectancy provision "can most reasonably be interpreted to mean that the time of adjudication is the relevant point of reference").[14] Where that

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[14] The Commissioner's conclusion that the date of the adjudication is the appropriate point of reference would appear to be compelled by the statutory text. Had Congress meant for the Commissioner to determine whether a disability was "expected to last" 12 months at some point in the past based solely on evidence available at that earlier time, it would not have made eligibility depend on whether the disabling impairment "can be expected"—present tense—to last 12 months. Instead, it would have made eligibility depend on whether the disabling impairment "could have been" or "was expected" to last that long. As the Commissioner observed: "If Congress had intended benefits to be awarded based on evidence that a claimant's impairment(s) did not in fact prevent substantial gainful activity for 12 continuous months, but only had been expected to do so at some earlier point in the 12-month period, we believe that Congress would have provided for a finding of disability based on an impairment(s) which *was* expected to last 12 months, in addition to one which *can be* expected to last 12 months." 65 Fed. Reg. at 42,780. In that regard, the court of appeals misquoted the pertinent statutory language in its holding, since it declared "that a claimant whose impairment * * * which 'lasted' of '*was* expected to last' for a continuous period of not less than twelve months may be disabled * * *. 42 U.S.C. § 423(d)(1)(A)." Pet. App. 8a (emphasis added). The statute actually uses the present tense, "can be expected," not the past tense, "was expected."

Moreover, requiring a determination of whether the inability could have been expected to last twelve months at some indeterminate point in the past would create a significant administrative burden. Decisionmakers would have to sift through a historical record and decide if, at some moment in the past, it would have been appropriate to predict that the inability to work would last 12 months—even if any such prediction would already have proven to be erroneous at the time of the adjudi-

determination takes place less than 12 months after the onset of the alleged disability, and the evidence shows that the impairment currently prevents substantial gainful activity, the adjudicator must decide whether the disabling impairment "can be expected to last" for the full 12-month period, *i.e.*, he must project the disability's expected duration. If the adjudicator determines based on the evidence that the inability to work by reason of the impairment can be expected to last for at least 12 months, the individual is disabled and "entitled" to disability insurance benefits, and a trial work period then "begin[s]" with the first month in which the individual became so entitled. 42 U.S.C. 422(c)(3). But when the evidence at the time the claim is adjudicated shows that the individual actually returned to (or became able to return to) substantial gainful activity within 12 months of the onset of the alleged disability, the adjudicator may rely on that evidence to conclude that the claimant's inability to work by reason of his impairment *already* has failed to last (and thus cannot be "expected" to last) for at least 12 months. In such a situation, the claimant has at no point "become[] entitled to disability insurance benefits" because he has not satisfied the duration requirement in the statutory definition of disability in Section 423(d)(1)(A), and the trial work period therefore never begins. *Ibid.*

That is precisely how Congress expected the process to function. Explaining the statutory text at issue here—"has lasted or can be expected to last"—the Senate Report on the 1965 amendments stated that, where "a worker has been under a disability which has lasted for less than 12 months, the bill would require only a prediction that the worker's disability will continue for a total of at least 12 calendar months after onset of the disability." S. Rep. No. 404, *supra*, at 99. Where the "disability has existed for 12 calendar months or

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cation. Nothing in the legislative record suggests that Congress intended to impose such a burden on the States or the Commissioner.

more" when the claim is adjudicated, the Report further explained, "*no* prognosis would be required." *Ibid.* (emphasis added). Instead, in that situation, the Commissioner may rely on the claimant's actual experience during the 12-month period when determining whether, at the time of the adjudication, the disability has lasted or can be expected to last the requisite duration. Similarly, no such prognosis would be required if, at the time the claim is adjudicated, the evidence shows that the impairment no longer prevents the performance of substantial gainful activity and did not do so for at least 12 months. See 65 Fed. Reg. at 42,774.

Responding to comments regarding this issue in the recent rulemaking proceeding, the Commissioner observed that Congress permitted the agency to find a disability "based on an impairment which 'can be expected to last' 12 months"—and did not limit the agency to finding disability where the impairment had *already* lasted 12 months—in order "to provide a means for [the agency] to adjudicate disability claims without having to wait 12 months from onset." 65 Fed. Reg. at 42,774. Nothing in the phrase "has lasted or can be expected to last at least 12 months," however, requires the Commissioner "to permit claims * * * in the face of specific evidence that the claimant's impairment did not in fact prevent him or her from engaging in substantial gainful activity for 12 continuous months." *Ibid.*

2. The court of appeals' contrary analysis is flawed. The court of appeals reasoned, in essence, that the Commissioner's regulation is contrary to the statutory language because it conditions entitlement to a trial work period on either a "finding of disability" or an actual inability to engage in substantial gainful activity for the 12-month period required by Section 423(d)(1)(A). Pet. App. 12a. The court rested that conclusion on its belief that the Act provides that the trial work period "shall begin" once the claimant is "eligible to receive benefits." *Ibid.* The court, however, misquoted the Act. The Act makes the trial work period begin

once an individual is "entitled" to benefits, not once he is "eligible." See 42 U.S.C. 422(c)(1). As explained above, an individual who, at the time the claim is adjudicated, has successfully engaged in substantial gainful activity before the expiration of the 12-month period is *not* "entitled" to benefits. Where the claimant never "becomes entitled to benefits," 42 U.S.C. 422(c)(1), the trial work period under Section 422 never "begin[s]."[15]

The court of appeals also thought it significant that, under the Commissioner's approach, entitlement to benefits (and thus to a trial work period) might sometimes be affected by when the claim is adjudicated. For example, if an adjudicator finds a claimant disabled following seven months of inability to engage in substantial gainful activity, based on a prediction that the claimant's inability to work will last at least an additional five months, the claimant receives benefits and a trial work period, even if the prediction later turns out to have been wrong and the claimant returns to work before the 12-month period has lapsed. In contrast, if the same claimant's request for benefits is adjudicated after the 12-month period has lapsed and the claimant successfully returned to work within the 12-month period, the claimant

[15] The court of appeals was also fundamentally mistaken when it stated that consideration of respondent's return to substantial gainful activity, in determining whether respondent was disabled, "was in contravention of the Act." Pet. App. 10a. Section 422(c)(2) does not prohibit consideration of the claimant's substantial gainful activity when determining whether a disability exists in the first instance. Instead, Section 422(c)(2) states that substantial gainful activity, if it occurs during the trial work period, is deemed not to have occurred when "determining whether his disability has *ceased* in a month during such period." 42 U.S.C. 422(c)(2) (emphasis added). See also H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 939 (1990) ("During this period, disabled beneficiaries may test their ability to work without affecting their entitlement to disability benefits. Any work and earnings are disregarded in determining whether the beneficiary's disability has ceased."). Section 422 thus addresses determinations of whether a disability has ceased, not whether the requirements for an initial finding of disability have been met.

would not be entitled to receive benefits or a trial work period.

As the Commissioner has explained, "the relatively infrequent, but regrettable, occasions in which" the timing of the adjudication affects the outcome are a "necessary" consequence of permitting the "SSA to adjudicate disability claims and award benefits without having to wait 12 months from onset," as well as the necessity of relying on potentially faulty predictions about an impairment's duration when doing so. 65 Fed. Reg. at 42,780. Simply put, the fact that some individuals may be awarded benefits (and trial work periods) based on predictions about the duration of their inability to engage in substantial gainful activity that turn out to have been incorrect in no way compels the Commissioner to award benefits to those individuals who, based on all the available evidence, clearly are *not* entitled to receive them. Certainly nothing in the Act compels the Commissioner to ignore evidence proving that the claimant's inability to engage in substantial gainful activity in fact did not last (and thus cannot be expected to last) the requisite period of time.

The court of appeals, however, appeared to suggest that the decisionmaker *must* ignore such proof and award benefits where, for example, the adjudicator knows that the claimant successfully returned to work before the 12-month period expired. There is no basis for reading such an exclusionary rule into the Act. In other legal contexts, evidence that develops after a claim is filed, but before it is adjudicated, is admissible even though the result may be that outcomes depend on when the adjudication takes place. For example, a plaintiff suing in tort for lost prospective wages will recover less if, after he is injured but before trial, he returns to work and thereby conclusively demonstrates that his earning capacity was not so greatly diminished as originally claimed. No one suggests that a jury would be precluded from taking such post-claim/pre-trial conduct into account merely because the evidence would not have been available

had the trial taken place earlier. Similarly here, there is no reason why the Commissioner should be barred from taking an applicant's post-claim return to work into account, where it bears directly on whether his inability to engage in substantial gainful activity by reason of the impairment has lasted (or can be expected to last) for at least 12 months.[16]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[16] The court of appeals' other reasons for rejecting the Commissioner's interpretation of the "can be expected to last" language in Section 423(d)(1)(A) also lack merit. First, the court rejected that interpretation because the Act does not explicitly mention adjudication as a prerequisite to a finding of disability. Pet. App. 13a. But the Act does permit a finding of disability when the impairment preventing substantial gainful activity "can be expected" to last 12 months. The Commissioner reasonably concluded that the relevant expectation is that of the decisionmaker, on the basis of the evidence available at the time of the disability determination. See p. 45 & note 14, *supra*. Second, the court observed that no other part of the Act "differentiates between claims adjudicated within twelve months, and claims adjudicated after twelve months." *Ibid.* But no other part of the Act contains similar statutory language regarding expectancies.